FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 16 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

DOROTHY MAY ARNOLD DAVIS,
Petitioner,

vs.

GRETCHEN A. PROSE, UNITED STATES OF AMERICA,
Respondents.

No. 612

PETITION

For a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

and

BRIEF

In Support Thereof.

HOWARD T. BATMAN,
DAVID I. DAY, JR.,
710 Ohio Street,
Terre Haute, Indiana,
THOMAS P. GALLAGHER,
409-414 Star Building,
Terre Haute, Indiana,
Attorneys for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Petition for writ of certiorari	1-5
Summary and statement of matter involved	2
The jurisdiction	3
Questions presented	3
Reasons relied upon for allowance of writ	4
Prayer for writ	5
Brief on petition for writ of certiorari	7-17
The opinion below	7
Jurisdiction	8
Concise statement of the case	8
Conclusion	17

Cases Cited.

Cohn v. Cohn (1948) (U. S. C. A., D. C.), 171 Fed. (2d) 828 ..... 4, 8, 10

Farmakis v. Farmakis (1949) (U. S. C. A., D. C.), 182 Fed. (2d) 291 ..... 4, 8

United States v. Yellow Cab Company, No. 22, October Term, 1949, decided December 5, 1949 (94 L. ed. 123) 4, 12, 15

Statutes Cited.

Federal Rules of Civil Procedure, Rule 52 (28 U. S. C. A.) 16

Regulation 3447 of the Veterans Administration 9

38 U. S. C., Sec. 802 (g) 9

28 U. S. C., Sec. 1254 (1) and Sec. 2101 (c) 3, 8

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

DOROTHY MAY ARNOLD DAVIS,
Petitioner,

vs.

GRETCHEN A. PROSE, UNITED STATES OF AMERICA,
Respondents.

No. .....

PETITION

For a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

and

BRIEF

In Support Thereof.

The petitioner, Dorothy May Arnold Davis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the cause entitled "Gretchen A. Prose, plaintiff-appellant v. Dorothy May Arnold Davis, et al., defendants-appellees", on the 26th day of October, 1949, reversing the judgment of the District Court of the United States for the Southern District of Indiana.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

This action was commenced in the District Court of the United States for the Southern District of Indiana by respondent, Gretchen A. Prose, against petitioner and the United States of America to recover the proceeds of a National Service Life Insurance certificate in the sum of $5,000.00 issued upon the life of William M. Arnold, effective October 1, 1942, and which certificate designated his father, Charles A. Arnold, as beneficiary, but designated no contingent beneficiary. The designated beneficiary died during the lifetime of the deceased soldier. The respondent, Gretchen A. Prose, is the sister of the deceased soldier and in her complaint asserted that the insured soldier took the necessary steps through army channels to change the beneficiary and named respondent Prose as beneficiary. The petitioner is the stepmother of the insured soldier and stood in loco parentis to him since he was a young boy. The Veterans Administration denied the claim of respondent Prose and awarded the insurance to the petitioner. Respondent Prose then began the action in the District Court of the United States (Record, page 1).

The United States admitted liability under the National Service Life Insurance certificate to the beneficiary lawfully entitled thereto (Record, page 6).

Petitioner appeared and answered (Record, page 8), and also filed cross claim (Record, page 10).

The District Court found against respondent Prose and found that petitioner was entitled to the proceeds of the insurance and that the insured soldier made no change in the designated beneficiary and did not so designate the respondent Prose, and gave judgment accordingly (Rec-

ord, pages 79 and 81). The Court of Appeals reversed and ordered judgment entered for respondent Prose (Record, page 115). The case is also reported in 177 Fed. (2d) 478.

THE JURISDICTION.

1. The jurisdiction of this Court is invoked under Title 28—U. S. C., Section 1254—(1)—and Section 2101 (c).

2. The judgment of the Court of Appeals was duly given on October 26, 1949 (Record, page 115), and petitioner's petition for rehearing was entertained and denied on November 18, 1949 (Record, page 119).

QUESTIONS PRESENTED.

The questions presented are as follows:

1. Whether a soldier, insured under a National Service Life Insurance certificate, may designate a beneficiary without executing any writing?

2. Whether a Court may render judgment awarding the proceeds of such a certificate without any evidence whatever of any writing designating (or changing) a beneficiary, but merely upon oral testimony that the deceased soldier had stated that he had named his sister beneficiary of his insurance?

3. Whether a Court of Appeals acting under Rule 52a of the Federal Rules of Civil Procedure, may reverse the judgment of the trial court which was founded upon a specific finding of the trial court, that the deceased soldier has made no change of beneficiary with respect to his National Service Life Insurance, and which finding was based upon oral evidence, and without proof of any writ-

ten change or any proof that any such writing was ever executed and was missing?

4. Whether the proceeds of the soldier's National Service Life Insurance may be awarded to the respondent without any proof of any writing signed by the insured soldier as required by Veterans Administration Regulations 3446 and 3447?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

I.

The decision of the United States Court of Appeals for the Seventh Circuit in this case is in conflict on the same matters with the decisions of the United States Court of Appeals for the District of Columbia (Cohn v. Cohn [1948], ... U. S. App. D. C. ...., 171 Fed. [2d] 828; Farmakis v. Farmakis [1949], ... U. S. App. D. C. ...., 172 Fed. [2d] 291).

II.

The decision of the Court of Appeals in this case is in conflict with applicable decisions of the Supreme Court of the United States in that the Court of Appeals tried this case de novo on the record, rejected the special findings of the trial court and substituted contrary findings by the Court of Appeals (United States v. Yellow Cab Co., No. 22, October Term, 1949 decided December 5, 1949, ... U. S. ....., 94 L. ed. 123).

III.

The decision of the Court of Appeals presents an important question of federal law, which question has not been, but should be settled by this Court, to-wit: Whether

or not oral evidence unaccompanied by any writing executed by the insured, is sufficient to designate a beneficiary of National Service Life Insurance.

Wherefore, petitioner respectfully prays that this Court issue its Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit, and upon final consideration that the judgment of the said Court of Appeals be in all things reversed.

Respectfully submitted,

HOWARD T. BATMAN,

DAVID I. DAY, JR.,
710 Ohio Street,
Terre Haute, Indiana,

THOMAS P. GALLAGHER,
409-414 Star Building,
Terre Haute, Indiana,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

DOROTHY MAY ARNOLD DAVIS,
Petitioner,

vs.

GRETCHEN A. PROSE, UNITED STATES OF AMERICA,
Respondents.

No. .....

BRIEF

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

THE OPINION BELOW.

There was no opinion by the District Court. The opinion of the Court of Appeals (Circuit Judges Kerner, Duffy and Finnegan, Judge Kerner writing) was given and filed October 26, 1949, and appears at page 109 of the Record. It is reported at 177 Fed. (2d) 478.

JURISDICTION.

The judgment of the Court of Appeals was entered October 26, 1949. Petition for rehearing was entertained and denied November 18, 1949.

The jurisdiction of this Court is invoked under Sections 1254 (1) [28 U. S. C. 1254 (1)] and 2101 (c) [28 U. S. C. 2101 (c)] of the Judicial Code (63 Stat. C. 139-101 and 104).

CONCISE STATEMENT OF THE CASE.

The facts are stated in the petition (Record, page 1), but we add: The deceased soldier lived with the petitioner since his thirteenth year until his marriage and at various times after his marriage (Record, pages 51 and 52).

I.

The decision of the United States Court of Appeals for the Seventh Circuit, in this case, is in conflict on the same matter with the decisions of the United States Court of Appeals for the District of Columbia in Cohn v. Cohn (1948) (U. S. C. A., D. C.), 171 Fed. (2d) 828, and Farmakis v. Farmakis (1949) (U. S. C. A., D. C.), 182 Fed. (2d) 291, in this, that the Court of Appeals of the District of Columbia held that a writing signed by the deceased soldier was the minimum requirement for changing the beneficiary, while the Court of Appeals for the Seventh Circuit in the case at bar, while declining to notice or comment on the case from the Court of Appeals for the District of Columbia, held that if the insured had expressed an intention to change the beneficiary originally named and done an affirmative act to effect the change, this was sufficient.

The Act of Congress in effect at the time of the death of the deceased insured provided that "the . . . insured shall have the right to designate the beneficiary or beneficiaries of the insurance . . . and shall subject to the **regulations**, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries, but only within the classes herein provided." 38 U. S. C., Section 802 (g).

Regulation 3447 of the Veterans Administration, in effect from October 16, 1942 to August 1, 1946, and during which period the deceased soldier was killed in action, provided that:

> "3447. **Beneficiary Changes.**—The insured shall have the right at any time, and from time to time, and without the knowledge or consent of the beneficiary to cancel the beneficiary designation, or to change the beneficiary within the class of beneficiaries set forth in R. & P. R.—3446. A change of beneficiary to be effective must be made by notice in writing signed by the insured and forwarded to the Veterans Administration by the insured or his agent, and must contain sufficient information to identify the insured. Whenever practicable such notices shall be given on blanks prescribed by the Veterans Administration. Upon receipt by the Veterans Administration, a valid designation or change of beneficiary shall be deemed to be effective as of the date of execution; Provided, that any payment made before proper notice of designation or change of beneficiary has been received in the Veterans Administration shall be deemed to have been properly made and to satisfy fully the obligations of the United States under such insurance policy to the extent of such payment" (Record, page 77).

The case of Cohn v. Cohn (1948) (U. S. C. A., D. C.), 171 Fed. (2) 828, was a much stronger case on the facts than is this case.

In the Cohn case the parents were named as beneficiaries and the wife claimed the soldier had afterwards designated her as the beneficiary of his insurance. The widow recovered judgment in trial court, which the Court of Appeals reversed. This despite evidence of one fellow officer that he had procured a "beneficiary blank" and gave it to Cohn, the deceased insured, and that he saw Cohn making motions as though writing on the form. He did not testify that he saw what Cohn wrote; another officer testified that Cohn told him that he had made his insurance out to his wife.

The witness also testified that upon one occasion the deceased soldier, Cohn, handed him a confidential sheet signed by Cohn, and that it named Helen Cohn as beneficiary for all purposes. The Court there held this insufficient.

The Court of Appeals held that this testimony did not remotely approach the evidence necessary to establish by parol the contents of a lost or missing document. The Court then noted that the regulations of the Veterans Administration require that a change in the named beneficiary be evidenced in writing, and said:

> "While the Courts have often held that no particular form is necessary for that writing, the requirement that there be a writing is the minimum necessary to protect the public, the families and loved ones of servicemen and the interests of the deceased insured veterans themselves against unmitigated fraud. Not only is the requirement reasonable, but it is necessary" (171 Fed. [2d] at 829).

The Cohn case is also strikingly similar to the case at bar in that there it was claimed that a "beneficiary slip" executed by the deceased was a change of beneficiary for his life insurance. This claim was also made here. In the Cohn case the Court further pointed out that the form related to the six months pay allowance to a widow, and said that the suggestion that this be deemed a change in the beneficiary of life insurance was so preposterous as to throw doubt upon the sincerity of the suggestion (page 830 of 171 Fed. [2]).

It is also claimed by respondent Prose that Insert No. 3 of the Soldiers' Service Record (which, incidentally, is not signed by the soldier), lists his sister as his beneficiary (Proposed Special Finding XII—Record, page 64). This exhibits lists Gretchen **M**. Prose and not Gretchen **A**. Prose as his nearest relative, gives her home address and contains the following:

> "Designation of Beneficiary, Gretchen A. Prose, Sister, 2204 North 14th St., Terre Haute, Ind. Soldier declines to designate alternate beneficiary to receive this pay. W. D. W. G. O. Form 41 sent A. G. 11 April 1944."

The only inference that may be drawn from the entry is that he was designating his sister, Gretchen M. Prose, as the beneficiary of his death gratuity pay and not his life insurance. The designation specifically states the deceased declined to designate "alternate beneficiary" to receive "**this pay**". It is inconceivable that even an illiterate person would be so confused as to refer to life insurance as "pay".

Further, the suggestion that the recital that A. G. O. Form 41 was sent to the Adjutant General was evidence that the soldier had **misused** this form for the purpose of changing the beneficiary of his insurance and that the

Personnel Officer missent it to the Adjutant General instead of the Veterans Administration, is an assumption not warranted by the evidence.

And again assuming that this far-fetched suggestion may be indulged, there is not a scintilla of evidence that the A. G. O. Form 41 named Gretchen M. or Gretchen A. Prose as beneficiary. If A. G. O. Form 41 was actually used by soldier for the purpose of designating the beneficiary of his insurance and there is absolutely no evidence to this effect, then it might as well be assumed he had designated his stepmother, the petitioner herein, as such beneficiary.

As a matter of fact, in proceedings before the Veterans Administration respondent Prose did not contend she had been designated as beneficiary, but contended only that petitioner did not stand in loco parentis to the deceased soldier (Record, page 19).

II.

The decision of the Court of Appeals in this case is in conflict with the decision of this Court in the case of United States v. Yellow Cab Company, No. 22, October Term, 1949, decided December 5, 1949 (94 L. ed. 123), in that the Court of Appeals tried this case de novo on the record, rejected the special findings of the trial court and substituted therefor its own.

The Trial Court's Special Finding C is as follows:

> "That no change of beneficiary with respect to National Service Life Insurance Policy N3794199 issued to William M. Arnold was ever made by Arnold after the death of his father, Charles Alford Arnold, who had originally been designated as the sole beneficiary under the policy" (Record, page 79).

The only evidence upon this subject was given by various relatives of the respondent Prose and by witnesses Divine and Hinckley. The testimony of the various relatives of respondent was merely that when the deceased soldier was home, due to the illness of the petitioner, his father unexpectedly died; that after his father's death the soldier stated that his other policy of insurance had named his sister, the respondent Prose, as contingent beneficiary. Witnesses Divine and Hinckley testified they served in Arnold's unit at Camp Butner. Witness Divine testified that he recalled that the soldier Arnold returned to Camp Butner on April 6th or 7th, 1944; that he gave him permission to see Hinckley and that he left and returned and stated to the witness that he had named his sister, Gretchen A. Prose, as beneficiary of his life insurance (Record, page 36).

Witness Hinckley testified that he was a platoon leader; that he issued the deceased soldier a furlough on March 22, 1944, and that he returned to Camp on April 6, 1944; that Arnold asked to go to Personnel to change his beneficiary; that he later saw the deceased soldier the next day and gave him permission to go to Personnel; that he came back prior to noon that same day. He also remembered that after he went to Personnel upon the second visit, that he returned to him, Lt. Hinckley, because he had told him to do so and that after he returned, the deceased soldier Arnold told Lt. Hinckley that he had his insurance completed, signed all the forms, that he had changed it to his sister (Record, pages 41, 42 and 43).

Lt. Hinckley also testified that he later had occasion to talk to the soldier Arnold and that he, Hinckley, made out a personal record card upon his own initiative, for his private information, which was not signed by anyone; that he did this at Camp Butner and he remembered he

did it in his barracks; that when he did so the witness Hinckley sat upon the foot locker of the soldier Arnold and asked him how much insurance he had; that he replied he had $10,000; that the witness Hinckley asked him as to his designated beneficiary; he replied Gretchen A. Prose, and that he, Hinckley, at that time put the questions and answers down upon a card which he preserved; that this card was made about the middle of April, 1944, at the time of his interview; that the card was not made pursuant to duty and was made for the personal information of the witness (Record, pages 43, 44 and 45).

The fact that the witness Hinckley and witness Divine testified that they remembered that he had named his sister as Gretchen A. Prose is significant when the trial judge came to weigh the testimony of his witness.

All of the exhibits in this case introduced on behalf of the respondent Prose, being in the handwriting of the deceased soldier, show conclusively that William M. Arnold knew his sister only as Gretchen M. Prose. The soldier's service record where he named his sister as beneficiary of his gratuity pay named her as Gretchen M. Prose.

The comments of the trial judge clearly disclose he did not believe this testimony (Record, page 47).

These witnesses remembered the dates, and Hinckley stated that he sat upon the foot locker when he made this card and that the soldier stated to him that his sister's name was Gretchen **A.** Prose. None of the soldier's correspondence to her was addressed to Gretchen **A.** Prose (See Exhibits 1 to 9, inclusive).

It is also significant that the witness Hinckley had none of the other cards with him, but only this one; that he

asserted he had the other 35 cards in the same foot locker at Long Beach.

It was the exclusive province of the trial judge to determine the credibility of all the witnesses and in doing so the Trial Court could consider the probability or improbability of the testimony, whether these witnesses would have such remarkable memories that they would remember the exact date and hour of a routine happening, occurring four years or more prior to the trial testimony. He could also consider the fact that both the witnesses Hinckley and Divine could be positive that the name of the respondent was Gretchen A. Prose (Record, pages 38 and 44), when the undisputed record evidence discloses that the soldier Arnold knew his sister only either as Gretchen M. or Gretchen Maxine.

Of course, whether her name is Gretchen A. or Gretchen M. would be of no importance save that an impartial trier of the facts, in weighing their testimony, could and should consider this disparity.

Witness Hinckley's memory also failed him when he testified that he knew that Arnold's father had died for the reason that he, Hinckley, had issued an emergency furlough (Record, page 43), for there is no dispute that the soldier Arnold returned home due to the serious illness of petitioner and that the father died unexpectedly while he happened to be at home.

We submit that the decision of the Court of Appeals in this case is clearly in conflict with the decision of this Court in the case of United States v. Yellow Cab Co., No. 22, October Term, 1949, decided December 5, 1949 (94 L. ed. 123, 70 Supreme Ct. 177), in that it, the Court of Appeals, in effect tried the case de novo upon record and rejected the special finding of the trial court that the

beneficiary of the soldier's life insurance certificate had never been changed and made its own special finding that it had been changed.

The trial Court sustained petitioner's view of the facts, and we respectfully submit that his findings were not "clearly erroneous" under Rule 52, Federal Rules of Civil Procedure, 28 U. S. C. A.

A choice by the trial Court between permissible views of the weight and credibility of the evidence is not "clearly erroneous" and we, therefore, respectfully submit that the Court of Appeals erred in reversing the trial court upon the basis of the evidence and the trial court's findings thereon.

The finding of the trial Court was that no designation had been made of respondent Prose as beneficiary on the insurance certificate in question (Finding C, Record, page 79).

The opinion of the Court of Appeals states:

> "It does not appear from the findings of the Court whether he disbelieved all of this evidence, or whether he considered it insufficient to effectuate the designation of plaintiff" (Record, page 112),

thus apparently requiring a trial judge to set out specifically why he made certain findings. We submit it is immaterial whether the trial Court disbelieved certain of the witnesses, for no testimony whatever was adduced showing an actual designation of respondent Prose as beneficiary. If, however, the trial Court did disbelieve certain witnesses, we submit that it is error on the part of the Court of Appeals to require a specific finding to such effect.

III.

The decision of the Court of Appeals presents an important question of federal law, which question has not been, but should be settled by this court.

In view of the millions of certificates of National Service Life Insurance now outstanding, and the large numbers of conflicting claims as to change of beneficiaries which will be presented to the Courts for judgments, it would seem to be of manifest importance to the lower courts and litigants that this Court finally settle the question as to whether or not oral evidence unaccompanied by any writing executed by the insured, is sufficient to designate a beneficiary of National Life Insurance.

Respectfully submitted,

HOWARD T. BATMAN,
DAVID I. DAY, JR.,
710 Ohio Street,
Terre Haute, Indiana,
THOMAS P. GALLAGHER,
409-414 Star Building,
Terre Haute, Indiana,
Attorneys for Petitioner.